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COURT OF APPEALS

STATE OF NEW YORK

D.T.,

Appellant,

-against-

IRWIN RICH and SAINT CABRINI HOME, INC.,

No. 207
(Papers sealed)

Respondent.

20 Eagle Street
Albany, New York 12207
October 23, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE ABDUS-SALAAM

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 207, D.T. v. Rich.
2 Counselor, do you like some rebuttal time?

3 MR. SPADA: Yes, one minute, Your Honor.

4 CHIEF JUDGE LIPPMAN: Okay, go ahead,
5 counsel.

6 MR. SPADA: May it please the court, my
7 name is Derek Spada, and I represent D.T. The lower
8 court should be reversed because there were questions
9 of fact - - -

10 CHIEF JUDGE LIPPMAN: What are the
11 questions of fact, counsel?

12 MR. SPADA: Your Honor, the - - - the
13 questions of fact, firstly, are whether respondent's
14 policies and protocols were reasonable, and if so,
15 whether their - - - their haphazard actions on this
16 unfortunate evening were reasonable and prudent or
17 not. So - - -

18 CHIEF JUDGE LIPPMAN: This ca - - - can
19 this kind of - - - can this kind of issue be a
20 question of law?

21 MR. SPADA: Sometimes, but not here. I
22 mean, in certain - - -

23 CHIEF JUDGE LIPPMAN: Your point, your
24 argument, is that it rarely is in this kind of
25 situation?

1 MR. SPADA: Very rarely. I mean, firstly,
2 it's - - - it's negligence, which is rarely an issue
3 for summary judgment. Secondly, it pertains to
4 foreseeability and - - - and reasonableness as the -
5 - - as the dissent laid out. Those are - - - are
6 classic jury issues, not issues to be resolved as a
7 matter of law. And in this case, they should not
8 have been resolved as a matter of law, and - - -

9 JUDGE SMITH: What - - - what was wrong
10 with the protocol? I mean you - - - you - - -
11 obviously if there's a dispute about it it's for a
12 jury.

13 MR. SPADA: Yes.

14 JUDGE SMITH: But tell your side of the
15 dispute. What's wrong with the protocol?

16 MR. SPADA: Sure, Your Honor. With - - -
17 with the protocol there's no written policies or
18 procedures in the record. There is very little to go
19 on as to what the - - - the policies and procedures
20 really were, but as explained by Ms. Mildred (ph.) in
21 her deposition testimony at pages 201 through 202,
22 she - - - she explains that when - - - when, not if,
23 but when a resident escapes and go out to Route 9W,
24 they're supposed to just follow them and give them
25 distance so as not to aggravate them.

1 JUDGE SMITH: They're not supposed to - - -
2 they're not supposed to - - - and that's really all
3 we know - - -

4 MR. SPADA: Well - - -

5 JUDGE SMITH: - - - is that there's a rule
6 that they're not supposed to touch them.

7 MR. SPADA: Well, part, Your Honor, but
8 then there's more to it. At pages 157 to 158 in the
9 record in Ms. Meyer's (ph.) testimony, she also talks
10 about once de-escalation fails, then they have to
11 restrain a - - - a resident. So part A of the
12 protocol seems to be de-escalation through talking,
13 through nonphysical means, and then when de-
14 escalation fails, then they have to physically
15 intervene. In this case, they took, like, this - - -
16 this middle route of corralling D.T. on Route 9W; it
17 was just a - - -

18 JUDGE GRAFFEO: Is that - - - is that the
19 aspect that you're focusing on, was when the child is
20 on the highway, or is it also her leaving the
21 facility to begin with? I'm - - - I'm trying to
22 determine is there more than one aspect of this - - -

23 MR. SPADA: Absolutely, Your Honor.

24 JUDGE GRAFFEO: - - - sequence that you
25 find - - -

1 MR. SPADA: Absolutely.

2 JUDGE GRAFFEO: - - - that does - - - isn't
3 deserving of summary judgment?

4 MR. SPADA: Certainly.

5 JUDGE GRAFFEO: Or is it just when they
6 actually find her on Route 9?

7 MR. SPADA: Your Honor, firstly, in the
8 manner in which D.T. escaped, it was about 10 o'clock
9 at night. She had a coat on, so there was some
10 notice she was about to leave when she put her coat
11 on, but no one saw that. She escaped through a door.

12 CHIEF JUDGE LIPPMAN: So it's both.

13 MR. SPADA: And - - - it's both, it's both.

14 CHIEF JUDGE LIPPMAN: So your point is - -
15 -

16 MR. SPADA: It's both, and she escaped
17 through a door that - - -

18 JUDGE GRAFFEO: So it's - - - so it's the
19 whole scenario from when she got to - - -

20 MR. SPADA: The whole sequence of events
21 from when she put her coat on to when she got hit.

22 JUDGE GRAFFEO: They - - - they did have a
23 quite a few employees looking for her.

24 MR. SPADA: There were - - -

25 JUDGE GRAFFEO: It isn't as if one person

1 just walked around the grounds.

2 MR. SPADA: Right, there were at least
3 four, and when she escaped, she escaped through a
4 door that should have an - - - an alarm on it. Seems
5 she went out through a fire door but the alarm was
6 turned off, or the front door, which should have been
7 locked and wasn't. So there was some negligence in
8 letting her out of the facility. Then when - - -
9 when she got out - - -

10 JUDGE GRAFFEO: How much - - - how much
11 time elapsed from when she left and when they found
12 her?

13 MR. SPADA: Thirty - - - from when they - -
14 - she left until they found her isn't precisely
15 clear, but it's somewhere - - - well, the - - - the -
16 - - the whole event was about thirty-five minutes.

17 JUDGE GRAFFEO: It seemed like less than an
18 hour. I was going to say it seemed like less than
19 forty minutes.

20 MR. SPADA: Yes, the - - - the whole time
21 from when she left until when she got hit is thirty-
22 five minutes. It - - - because she left at 10 p.m.
23 and the police accident report says the collision at
24 10:35 and - - -

25 CHIEF JUDGE LIPPMAN: So there are various

1 critical points is what you're arguing?

2 MR. SPADA: There's a - - -

3 CHIEF JUDGE LIPPMAN: From in those forty
4 minutes that there are different issues of fact
5 raised in each - - -

6 MR. SPADA: All along the way. All along
7 the way, and at first, once they realized that she
8 was out, one employee went out. And then - - - that
9 was Ms. Boleyn (ph.), and then she brought her cell
10 phone and couldn't find D.T., called back, and then
11 someone else came out. And then - - -

12 JUDGE SMITH: Can you - - - can you slow -
13 - - slow - - - slow down a minute for it. Can you
14 point to - - - you say there are a lot, but is there
15 one particular moment where you can say one person
16 did something wrong?

17 MR. SPADA: One person individually who did
18 something wrong, I would say yes. I - - - I can't
19 name the person, because I don't know who did what
20 precisely as the events unfolded. But I will say,
21 firstly, the person who failed to ensure that those
22 doors were alarmed did something wrong. Secondly,
23 the person who failed to ensure that their front door
24 was locked did something wrong. Thirdly, the person
25 who failed to notice D.T. with her coat on did

1 something wrong.

2 JUDGE SMITH: You - - - you say it's
3 negligence not to have the kids locked in?

4 MR. SPADA: Not necessarily locked in, but
5 have the doors alarmed, at least. So if someone goes
6 out, an alarm will sound and they'll catch it right
7 away. This - - -

8 JUDGE SMITH: But of course - - - of course
9 they - - - well, but did - - - she didn't slip out
10 unnoticed; they knew she went out, right?

11 MR. SPADA: They - - -

12 JUDGE GRAFFEO: There is a group of them
13 that left, right? Am I - - - did I misunderstand the
14 record?

15 MR. SPADA: I bel - - - I believe there was
16 just one on this evening, Your Honor. When - - - in
17 the past other people left, and D.T. left other
18 facilities before being placed at respondent's
19 facility, of which respondent had notice, and
20 respondent also had notice that D.T. escaped from
21 this facility a couple of times. That's explained on
22 158 in the record in Ms. Meyer's testimony, and - - -

23 JUDGE SMITH: But - - - but I'm - - - I'm -
24 - - going back to the alarm, though, I'm having
25 trouble, I mean, with - - - with what - - - as I

1 understand it, said one of the people saw her leave
2 and followed her?

3 MR. SPADA: It's not clear as to whether
4 she - - - as to whether she saw her leave or whether
5 she went out after when she realized she was missing.
6 So I - - - from - - - from the testimony it's - - -
7 you know, I don't believe it's clear, but - - -

8 JUDGE SMITH: If you assume it's the
9 former, though, then the alarm doesn't matter. I
10 mean if you - - -

11 MR. SPADA: Well - - -

12 JUDGE SMITH: - - - see somebody leave I
13 don't care whether there's no siren or not.

14 MR. SPADA: Sure, that's - - - that's a
15 good point, Your Honor, yes, but - - -

16 JUDGE ABDUS-SALAAM: I'd - - - I'd like to
17 go back to something Judge Graffeo asked you about
18 the scope of what you're complaining about, because
19 there was a lot of information about the child's
20 mental state. Are you also talking about some sort
21 of notice to the facility that she might have been
22 depressed or some other - - - in some other way - - -

23 MR. SPADA: Yeah, she - - -

24 JUDGE ABDUS-SALAAM: - - - susceptible to
25 leaving the facility and had some other problems that

1 they needed to be aware of while she was on the road?

2 MR. SPADA: Yes, she had some suicidal
3 tendencies.

4 CHIEF JUDGE LIPPMAN: Suicidal?

5 MR. SPADA: Well, she - - - she made
6 threats on cutting herself in the past.

7 CHIEF JUDGE LIPPMAN: And that's suicidal?

8 MR. SPADA: Well, it's not - - - it's not -
9 - - it's not normal.

10 CHIEF JUDGE LIPPMAN: And you - - - we
11 understand mutilation. Does that mean it's suicidal?

12 MR. SPADA: I would say it could be viewed
13 that way. Not necessarily, I mean, she never said
14 she was going to definitely kill herself, but making
15 threats on cutting oneself is not normal.

16 JUDGE SMITH: Well, is that - - - I mean
17 are you saying that a - - - a - - - a home like this
18 can be found negligent if a child is - - - is
19 threatening to cut herself by not - - - not - - - not
20 isolating her, putting her on suicide watch, putting
21 extra guard on her? What - - - what are they
22 supposed to do?

23 MR. SPADA: No, what they're supposed to
24 do, Your Honor, is - - - well, what they're supposed
25 to do is at least have these doors alarmed or pay

1 attention to - - - to their residents more closely,
2 especially when there's a history of residents, and
3 this particular resident, escaping from this
4 facility. And - - - but the - - - the negligence
5 that happened, the - - - I'd say the - - - the most
6 glaring negligence occurred when they were out there
7 on the roadway. There were warned by - - -

8 CHIEF JUDGE LIPPMAN: What's the standard
9 of care?

10 JUDGE READ: What's - - - what's really the
11 - - - yeah, what's the standard?

12 CHIEF JUDGE LIPPMAN: What's the standard
13 of care?

14 MR. SPADA: The standard of care, Your
15 Honor, has not - - - I would say, based on the legal
16 precedent, it's not yet been set, the standard of
17 care in this case. There's the - - - the reasonable
18 - - -

19 JUDGE GRAFFEO: Do you want a standard of
20 care that's equivalent to a - - - to a mental health
21 facility?

22 MR. SPADA: Well, I would say it's not
23 quite like a psychiatric institution, because it's -
24 - - it's different than psychiatric, but - - -

25 JUDGE GRAFFEO: This is - - - this is

1 certainly not a psychiatric institution.

2 MR. SPADA: It's not, Your Honor, that's -
3 - - that's correct. But it's also not an ordinary
4 parent's house or an ordinary school.

5 CHIEF JUDGE LIPPMAN: So it's in between
6 the two?

7 MR. SPADA: It's in between in a - - - in a
8 gray area.

9 CHIEF JUDGE LIPPMAN: It's in between?

10 MR. SPADA: Yeah so it's - - - it's more -
11 - - it's a more stringent standard than a completely
12 - - -

13 CHIEF JUDGE LIPPMAN: What about if we
14 think it's just a reasonable parent standard? You
15 still - - -

16 MR. SPADA: Abs - - - abs - - -

17 CHIEF JUDGE LIPPMAN: - - - have an issue
18 to go to the jury?

19 MR. SPADA: Absolutely, because with a - -
20 - with that standard, Your Honor, then the negligence
21 pertains primarily to really occurred on the roadway,
22 and the question is, is it reasonable and prudent for
23 a parent or teacher or adult, or several adults here
24 in this case, to use a vehicle and corral a thirteen-
25 year-old troubled youth on the middle of Route 9W on

1 a rainy and foggy night while she's wearing a - - - a
2 dark-colored coat? It's - - -

3 JUDGE GRAFFEO: What - - - what standard
4 did you argue to the jury?

5 MR. SPADA: We didn't get there. It - - -
6 it was summary judgment where we got dismissed.

7 JUDGE GRAFFEO: I'm sorry, this is summary
8 judgment.

9 MR. SPADA: But in summary judgment - - -

10 JUDGE GRAFFEO: What - - - what standard
11 did you submit to the court? I - - - I'm sorry.

12 MR. SPADA: The - - - the standard that I
13 submitted - - - well, the standard that I submitted
14 was more towards a - - - a psychiatric institution.
15 That more - - -

16 JUDGE GRAFFEO: It was more heightened.

17 MR. SPADA: More heightened, more
18 heightened.

19 JUDGE GRAFFEO: I think your paper said
20 more a - - - a request for a heightened standard.

21 MR. SPADA: Yeah, and in the - - - in the
22 lower court and Supreme Court the issue wasn't raised
23 by respondent as to the standard, and so the standard
24 isn't in my original papers, but then it's raised by
25 Supreme Court in the - - - in the decision. It was a

1 sua sponte topic that was raised in the lower court.
2 So the standard, you know, it's out there to be ruled
3 upon if you - - - if you choose so, but - - -

4 JUDGE READ: And that - - - and that's the
5 reasonable parent standard? That's the standard the
6 - - - that's the standard the Supreme Court used?

7 MR. SPADA: It's - - - yes, that's the
8 standard that the - - - the Supreme Court found. But
9 under these facts in this case, it should be a
10 heightened standard based on the history, and under -
11 - - under any standard there's - - -

12 JUDGE SMITH: Well, going back to the
13 roadway, can you be a little more specific of what
14 that - - - what - - - who did what that was wrong
15 while they were on the roadway?

16 MR. SPADA: There were four, or possibly
17 five, employees out there. One had a car, and as
18 they followed her, one passed her with the car and
19 tried to - - - to box her in. And going back to the
20 policies and procedures of respondent that are
21 outlined in the testimony of Ms. - - - Ms. Meyer,
22 they didn't give her space, obviously, because they
23 were right on her trying to lever - - - I - - - I
24 don't - - - I don't know what they were doing.

25 JUDGE SMITH: Oh, so you're complaining it

1 was negligence.

2 MR. SPADA: But no one tried - - -

3 JUDGE SMITH: You're also complaining they
4 didn't follow it?

5 MR. SPADA: They didn't follow it, and no
6 one tried to grab her, and she was on the roadway for
7 up to five minutes based on - - -

8 JUDGE SMITH: I mean can a jury - - - could
9 a jury really find on this record that it was
10 negligent not to try to grab her? I mean isn't that
11 obviously the sort of thing, when a kid is in that
12 situation, you have this horrible choice do I - - -
13 do I grab her and maybe she'll run into the traffic,
14 or do I try to calm her and talk her down?

15 MR. SPADA: Your Honor, the - - - the jury
16 could absolutely find that there's negligence based
17 on their failure to attempt to grab her. When
18 there's four adults, if not more, out there - - -

19 JUDGE SMITH: If they'd attempted to grab
20 her and she was hurt you'd be suing because they did
21 it.

22 MR. SPADA: No, I don't think I would have
23 a case under those circumstances if she was injured
24 while being taken off the roadway for her own safety.

25 JUDGE RIVERA: Did - - -

1 MR. SPADA: In this case they corralled her
2 on the road.

3 JUDGE SMITH: What if they tried to grab -
4 - - what if they tried to grab her and she ran away
5 and ran in front of a car?

6 MR. SPADA: Well, when there's four - - -

7 JUDGE SMITH: You'd sue.

8 MR. SPADA: When - - - when there's four
9 adults out there, one of them should have been able
10 to grab her, and that's part of respondent's
11 procedures.

12 JUDGE SMITH: You're almost saying res ipsa
13 loquitur, aren't you?

14 MR. SPADA: Pardon?

15 JUDGE SMITH: You're saying - - - you're
16 saying that for four - - - for this - - - this kid to
17 get away from four adults, that couldn't happen
18 without negligence.

19 MR. SPADA: Basically yes, yes. And - - -

20 JUDGE RIVERA: Did - - - I'm sorry.

21 MR. SPADA: Go ahead.

22 JUDGE RIVERA: No, finish. I'm sorry.

23 JUDGE SMITH: No, I'm done.

24 JUDGE RIVERA: Did - - - yeah, did - - -
25 did they call law enforcement?

1 MR. SPADA: No.

2 JUDGE RIVERA: Did they advise anyone that
3 she had escaped?

4 MR. SPADA: They never called the police,
5 never called her - - -

6 JUDGE RIVERA: Ask anyone to close the
7 road?

8 MR. SPADA: No, no.

9 CHIEF JUDGE LIPPMAN: Okay, counsel.

10 MR. SPADA: Thank you.

11 CHIEF JUDGE LIPPMAN: You'll have your
12 rebuttal.

13 MS. GOLDBERG: May it please the court, I'm
14 Barbara Goldberg. I represent the Saint Cabrini
15 Home.

16 CHIEF JUDGE LIPPMAN: Counsel, why - - -
17 why aren't there issues of fact here? There seems a
18 lot of gray areas as to what they should have or
19 shouldn't done - - - shouldn't have done.

20 MS. GOLDBERG: Your Honor - - -

21 CHIEF JUDGE LIPPMAN: Why - - - why even
22 using a - - - a - - - a reasonable parent test, why
23 isn't this the kind of case that should almost
24 invariably go to a jury rather than be decided as a -
25 - - as a matter of law?

1 MS. GOLDBERG: Your Honor, I respectfully
2 disagree with that because - - -

3 CHIEF JUDGE LIPPMAN: There are no gray
4 areas?

5 MS. GOLDBERG: I don't think there are any
6 gray areas because - - -

7 CHIEF JUDGE LIPPMAN: Your - - - you - - -
8 they did everything right in terms of the - - - the
9 child getting out from the home? They did everything
10 right on the road? That's clear and unmistakable as
11 a matter of law?

12 MS. GOLDBERG: Your Honor, if I can just go
13 back a little bit. I believe - - -

14 CHIEF JUDGE LIPPMAN: I know, but answer my
15 question.

16 MS. GOLDBERG: Yes, I'm - - - I'm going to
17 answer your question. I don't think that there are
18 any gray areas, because what Mr. Spada would
19 characterize as gray areas are - - -

20 CHIEF JUDGE LIPPMAN: Take us through what
21 happened here and explain why there's no gray area.

22 MS. GOLDBERG: All right, I will be very
23 happy to do that, Your Honor. It was about 10
24 o'clock at night. The girls in cottage 1, of which
25 D.T. was a resident, were getting ready for bed. It

1 was 10 o'clock. D.T. suddenly and unexpectedly ran
2 out of the residence. She was noticed by Ms. Boleyn,
3 who followed her, said she was going after her. Ms.
4 Meyer, who was present at the time, said give us a
5 call if you need help. Now, the evidence is clear
6 that this was an unlocked facility. Plaintiff put in
7 no proof that the doors of this facility were
8 required to be locked from the inside at night or at
9 any other time. There's just no proof in that re - -
10 -

11 JUDGE SMITH: But what about - - - what
12 about the girl's own testimony? She - - - her - - -
13 her recollection was that they were locked or she was
14 usually locked in but that night she got out somehow?

15 MS. GOLDBERG: Your Honor, again, whether -
16 - - I - - - I've said that even if there's an issue
17 in that regard, it's not an issue of fact that
18 requires sending the case to - - -

19 JUDGE SMITH: You say there's not a
20 material issue, why not?

21 MS. GOLDBERG: - - - the jury. It is not a
22 material issue.

23 JUDGE GRAFFEO: Where there - - - where
24 there alarms on the doors of the cottage?

25 MS. GOLDBERG: According to Ms. Meyer's

1 testimony, there were alarms on two fire doors. It's
2 not clear that there was an alarm on the front door,
3 but, again, as was mentioned previously, the record
4 indicates that Ms. Boleyn noticed - - - my - - - my
5 reading of the record is this Ms. Boleyn noticed her
6 as she was leaving the residence, followed after her
7 immediately. She called back and said that she
8 couldn't find her. They called Mr. Balino (ph.), who
9 was the administrator on duty. That was well within
10 the protocol as established by Ms. Oliver's (ph.)
11 affidavit.

12 JUDGE ABDUS-SALAAM: Are the protocols
13 written, counsel?

14 MS. GOLDBERG: I'm sorry?

15 JUDGE ABDUS-SALAAM: Are the protocols
16 written? This was all testimony, right. Are there
17 written protocols that one could look at?

18 MS. GOLDBERG: Your Honor, it's not clear
19 from the record whether the protocols were written or
20 not, but Ms. Oliver - - -

21 JUDGE PIGOTT: Well, do you know that? As
22 their lawyer, can you tell us whether or not they
23 have written protocols? Have you ever seen written
24 protocols?

25 MS. GOLDBERG: I personally have not seen

1 the written protocols.

2 JUDGE GRAFFEO: Are they regulatory or - -
3 - the - - - it - - -

4 MS. GOLDBERG: Well, there - - - there are
5 - - -

6 JUDGE GRAFFEO: In the summary judgment
7 motion, were there any regs that were attached?

8 MS. GOLDBERG: Yes, there - - - there - - -
9 well, I think the court can take judicial notice of
10 the - - - of the regs. Ms. Oliver stated in her
11 affidavit that the staff-to-resident ratio in the
12 cottages actually exceeded what was required by the
13 regulations. The regulations require one staff
14 person for each age range.

15 JUDGE GRAFFEO: Well, I'm not - - - I'm not
16 mentioning staffing. I'm referring to more to what
17 to do when one of the inhabitants leaves the
18 facility.

19 MS. GOLDBERG: In my research I didn't find
20 any regulations that dealt with that, Your Honor.
21 However, I did find a regulation that said that it's
22 not permissible to keep a child in a locked room.
23 I'm - - - I'm not aware of any regulations dealing
24 with what to - - - what to do in a situa - - -

25 CHIEF JUDGE LIPPMAN: So is it hard to - -

1 - for us to answer whether, as a matter of law,
2 everything was done properly when we don't even know
3 what the - - - the - - - the protocols are?

4 MS. GOLDBERG: Well, Your Honor, we do - -
5 - we do know what the protocols are because - - -

6 CHIEF JUDGE LIPPMAN: How do we know that?

7 MS. GOLDBERG: - - - we know that from the
8 affidavit that Ms. Oliver submitted, and we know that
9 from Ms. Meyer's testimony. The prot - - -

10 CHIEF JUDGE LIPPMAN: And we have - - - we
11 have the affidavit of the victim, right?

12 MS. GOLDBERG: Well, we don't have an
13 affidavit from the - - - from the plaintiff. We have
14 the deposition testimony.

15 CHIEF JUDGE LIPPMAN: The deposition,
16 excuse me.

17 MS. GOLDBERG: The deposition testimony of
18 the plaintiff.

19 CHIEF JUDGE LIPPMAN: So that doesn't raise
20 any issues?

21 MS. GOLDBERG: That doesn't raise any
22 issues, because the protocol was that you use
23 therapeutic crisis intervention, you use de-
24 escalation technique.

25 JUDGE PIGOTT: What is de-escalation?

1 MS. GOLDBERG: De-escalation techniques, as
2 explained by Ms. Meyer, is that you try to talk to
3 someone, you try to calm them down, you try to get
4 them out of the potentially dangerous situation.

5 JUDGE PIGOTT: That's - - - excuse me.

6 JUDGE RIVERA: And - - - and is it the - -
7 - is it the same protocol if you already have had an
8 experience where the same individual has escaped - -
9 -

10 MS. GOLDBERG: Well - - -

11 JUDGE RIVERA: - - - and has a history of
12 escaping. Is it the same protocol?

13 MS. GOLDBERG: Your Honor, I - - - I
14 disagree with the use of the word escape, bec - - -
15 and I think that's an attempt to exaggerate what went
16 on here. The testimony in the record is that she had
17 left the cottage on one or two prior occasions. And
18 on those two occasions, staff members saw her said
19 come back; she came back. There was never an
20 incident. There - - - there was not a repeated
21 history of this person trying to pull the - - -

22 JUDGE PIGOTT: Well, then why - - - why did
23 Ms. Meyer say that she knew that the plaintiff needed
24 to be watched and needed a lot of guidance because
25 she'd left before?

1 MS. GOLDBERG: The reference there is that
2 she had AWOLed, A-W-O-Led, on a couple of occasions
3 from the previous institut - - -

4 JUDGE PIGOTT: Right, you - - - you want to
5 call it - - - you want - - - there's elopement,
6 there's escape, now there's away without leave?

7 MS. GOLDBERG: Well, the - - - it's not my
8 terminology, Your Honor. It's the terminology that's
9 in the record. But my point is that none of these
10 prior episodes, that we actually have very little
11 detail about in the record, none of the prior
12 episodes was such as to put them on notice that she
13 was at risk.

14 JUDGE PIGOTT: See that's what you say.
15 There's a lot of conclusions here like - - - like the
16 - - - the - - - the Oliver who talked about de-
17 escalation, and I thought what in the world is de-
18 escalation and you say well, you just talk to them.

19 MS. GOLDBERG: That - - - that's what she
20 said.

21 JUDGE PIGOTT: If I was a parent and my
22 daughter was out in the middle of the night running
23 away, I'd call the cops, and that didn't happen here.
24 And the police have lights and sirens and they have
25 abilities to find people and to command some

1 presence. And that apparently wasn't done. Now, I
2 don't know if that's a basis in this case or not, but
3 I didn't see particularly what Cabrini did that even
4 matched close to that.

5 MS. GOLDBERG: Well, I think that what - -
6 - what Cabrini - - - even before I get to what
7 Cabrini did, Your Honor, I think that on this record
8 it's pure speculation as to what would have happened
9 if the police had been called. If she was - - - if
10 she wouldn't go into the staff vehicle when that came
11 up - - -

12 JUDGE PIGOTT: That's why a summary
13 judgment is so difficult, don't you agree?

14 MS. GOLDBERG: But Your - - - Your Honor,
15 summary judgment, and it's very well established, the
16 court has said many times that issues of fact have to
17 be more than speculation. They have to be more than
18 whoever - - -

19 CHIEF JUDGE LIPPMAN: Yeah, but you're
20 asking us to grant as a matter of law based on what
21 you say. If - - - if I say I took every precaution
22 and I treated this issue - - - this situation
23 perfectly, so then summary judgment because we just
24 accept that you're right? When, again, I - - - I
25 come back to what I said to you originally. At every

1 step of the way there seems to be gray areas that
2 would raise to anyone's mind as to whether the home
3 acted properly. Why - - - why is that such a
4 difficult concept? Does it have to be we - - - we -
5 - - we say it. We're not telling you what our
6 protocols are, but we've been trained in whatever it
7 is and we did it right? That can't be enough.

8 MS. GOLDBERG: Your - - - Your Honor, it -
9 - - it is enough because at each level we established
10 that we had more than sufficient staffing, we
11 established that we had - - -

12 JUDGE PIGOTT: For example, you had a - - -
13 you had a staffer who said I was directed. I could
14 not grab her. I - - - I can't touch her. Does that
15 make sense when you - - - when you've got a person
16 out of the middle of the night on a dark road?

17 MS. GOLDBERG: Your Honor, I think - - - I
18 think it does make sense because don't - - -

19 JUDGE PIGOTT: Could reasonable minds
20 disagree with respect to that?

21 MS. GOLDBERG: You don't know - - - you
22 don't know what's going to happen. It's pure
23 speculation.

24 JUDGE GRAFFEO: But how could - - - how - -
25 - how did - - - I'm having trouble understanding how

1 four adults are out on this roadway for what, almost
2 ten minutes, and no one can put this child back in
3 the car?

4 MS. GOLDBERG: Your - - - Your Honor, she
5 was actually in the road as opposed to being on the -
6 - -

7 JUDGE GRAFFEO: I don't understand what the
8 aim of the protocol is if it isn't to preserve the
9 safety of the - - - of the adolescent.

10 MS. GOLDBERG: They - - - they were - - -
11 they were trying to talk to her. They - - - on each
12 time that she went across the road, a staff member
13 followed her and the staff member - - -

14 CHIEF JUDGE LIPPMAN: But maybe - - - maybe
15 someone could believe that their actions were
16 negligent in the decisions that they made. That's
17 all - - - all - - - I think the line of questioning
18 you've been getting just now is just we understand
19 what your position is, but, as Judge Pigott said
20 before, couldn't reasonable people see this
21 differently as to whether the - - - the home was
22 negligent in what they did or whether they acted
23 perfectly, as you say, and did it just right? Why is
24 this such a difficult concept?

25 MS. GOLDBERG: Your Honor, there was no

1 proof put in by the plaintiff in opposition to the
2 motion as to what should have been done differently.
3 They didn't - - -

4 JUDGE PIGOTT: Only because their position
5 is that you have not established your entitlement to
6 judgment as a matter of law.

7 MS. GOLDBERG: But I think the safer thing
8 to do, Your Honor, would have been to put in proof
9 from the - - - a social worker, this is what an
10 acceptable protocol - - -

11 CHIEF JUDGE LIPPMAN: But - - - but there's
12 a burden here that has to be met, right, to get
13 summary judgment?

14 MS. GOLDBERG: And I - - - I think that we
15 - - - we - - - we met that, Your Honor, because - - -

16 JUDGE ABDUS-SALAAM: What do you think is
17 the standard that should be used here, counsel?

18 MS. GOLDBERG: I think the standard of
19 care, here, is the standard that the Supreme Court
20 and both the majority and the dissent at the
21 Appellate Division applied, that's the standard of
22 the reasonably prudent parent. And in order to raise
23 issues of fact, the plaintiff would have to show that
24 a parent in the exact same situation would invariably
25 have done something different, and I don't think that

1 - - -

2 JUDGE RIVERA: Does - - - does - - - does
3 he have a burden if you haven't met yours?

4 MS. GOLDBERG: Your Honor, the case law is
5 very well established. I have to concede that if the
6 movant doesn't make out a prima facie entitlement to
7 summary judgment, then the burden never shifts. But
8 I submit that here we did and the burden did shift.

9 CHIEF JUDGE LIPPMAN: Okay, counselor.
10 Let's hear rebuttal from your adversary.

11 Counsel?

12 MR. SPADA: Thank you. The - - - the
13 questions here that you've asked throughout this
14 argument are really - - - it's really a fact-based
15 issue here. There's - - - yeah, there some issues of
16 law, as well, but there's lots of issues of fact in
17 this case every step of the - - -

18 JUDGE SMITH: And I guess what - - - what's
19 bothering me is can it ever happen that a child in
20 the care of a facility like this is injured and the -
21 - - and the - - - and the - - - the case doesn't get
22 to a jury?

23 MR. SPADA: It could happen but, you know,
24 under certain circumstances it could happen, Your
25 Honor, but under these circumstances it - - -

1 JUDGE SMITH: You - - - you have to meet
2 the burden of proving that everything you did was
3 perfect. Can anybody ever meet that burden?

4 MR. SPADA: They could have met the burden
5 if they submitted their protocols, perhaps if they -
6 - - if they had an expert to reinforce the - - -

7 JUDGE PIGOTT: Well, and in that way if
8 they had said that the doors are unlocked and we
9 didn't know that she was missing and, therefore, we
10 never pursued her.

11 MR. SPADA: In that case, it - - - it could
12 go back to whether the doors should have been locked
13 or alarmed and they may have missed her going out.
14 Then they're - - - yeah, that's a possibility, but
15 that's more - - - more of a stretch. In this case,
16 the - - -

17 JUDGE READ: But aren't they inevitably
18 just making discretionary decisions that reasonable
19 minds could differ over, but does that mean it's
20 negligent?

21 MR. SPADA: That's for a jury to resolve,
22 whether it's negligent. There's - - - there's issues
23 here that, you know, people can differ over but - - -

24 JUDGE READ: I - - - we've - - - we've
25 talked about if they had purs - - - if they had

1 pursued or crossed, I mean, she might have been
2 chased into traffic if they tried to approach her. I
3 mean you - - - you never know, you don't know.
4 Aren't - - - didn't they make - - - isn't that what
5 we're - - - aren't we really second-guessing
6 discretionary decisions that they made?

7 MR. SPADA: No, Your Honor, what they did
8 here in this case was about the worst possible thing
9 they could have done. They corralled her on the
10 highway when they - - - if they had just let - - -
11 just let her go and followed plan A in de-escalation
12 where Ms. Meyer testified they just follow them at a
13 safe distance. That's - - -

14 JUDGE READ: And that's - - - that's clear?

15 MR. SPADA: That's - - -

16 JUDGE READ: That would be clear in - - -

17 MR. SPADA: Well, that would be at least in
18 - - - in - - - it would at least comport. That would
19 - - -

20 JUDGE READ: And that's what you're going
21 to prove to - - - that's what you're going to prove
22 to the jury?

23 MR. SPADA: Well, that would at least
24 comport with their protocols. Now whether those
25 protocols were reasonable is part B of that issue,

1 but part A is that's - - - that's their - - - yeah,
2 that's - - - if the jury accepts the - - - their
3 purported protocols, then the jury could find that
4 they should have done that - - -

5 CHIEF JUDGE LIPPMAN: Okay, okay,
6 counselor.

7 MR. SPADA: Okay, thank you.

8 CHIEF JUDGE LIPPMAN: Thank you both.

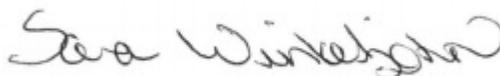
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of D.T. v. Irwin Rich, No. 207 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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